

Part III - Administrative, Procedural, and Miscellaneous

Elimination of Filing Requirement for Nonresident Alien Individuals with United States Source Effectively Connected Wages below the Personal Exemption Amount

Notice 2005-77

SECTION 1. PURPOSE

This notice announces that Treasury and the Internal Revenue Service (the Service) will amend Treas. Reg. §1.6012-1(b)(2) by adding a new exception from the filing requirement for nonresident alien individuals. Subject to the limitation described below, the new exception will eliminate the filing requirement for nonresident alien individuals who are required to file a return under the present regulations solely because they earn wages that are effectively connected with a United States trade or business in the tax year. This new exception will only apply to those nonresident alien individuals who earn wages that are less than the amount of one personal exemption under section 151 of the Internal Revenue Code (the Code).

SECTION 2. BACKGROUND

In general, section 6012(a)(1)(A) requires every individual having gross income in the taxable year that equals or exceeds the exemption amount to

make a return with respect to income taxes under subtitle A of the Code. Flush language at the end of section 6012(a) provides that, subject to certain conditions, limitations, and exceptions and under such regulations as may be prescribed by the Secretary, nonresident alien individuals subject to the tax imposed by section 871 of the Code may be exempted from the requirement of making returns under section 6012.

Under §1.6012-1(b) of the regulations, every nonresident alien individual who is engaged in a trade or business in the United States at any time during the taxable year must make a return on Form 1040NR, *U.S. Nonresident Alien Income Tax Return*. For this purpose, it is immaterial that the gross income for the taxable year is less than the minimum amount specified in section 6012(a) for making a return. Thus, a nonresident alien individual who is engaged in a trade or business in the United States at any time during the taxable year is required to file a return on Form 1040NR, even though (a) he has no income that is effectively connected with the conduct of a trade or business in the United States, (b) he has no income from sources within the United States, or (c) his income is exempt by reason of an income tax convention or any section of the Code.

Section 864(b) of the Code defines the term “trade or business within the United States” to include the performance of personal services within the United States at any time during the taxable year. Section 864(b)(1) provides an exception to this definition for the performance of personal services (A) for a nonresident alien individual, foreign partnership or foreign corporation not

engaged in a trade or business within the United States; or (B) for an office or place of business maintained in a foreign country or in a possession of the United States by an individual who is a citizen or resident of the United States or by a domestic partnership or corporation, by a nonresident alien individual temporarily present in the United States for a period or periods not exceeding a total of 90 days during the taxable year and whose compensation for such services does not exceed \$3,000 in the aggregate.

Assuming the nonresident alien individual engages in a United States trade or business under section 864(b) because he performs personal services in the United States during the tax year, §1.864-4(c)(6)(ii) of the Income Tax Regulations provides that wages, salaries, compensations, or other remunerations received by the nonresident alien individual for performing those personal services in the United States constitute income that is effectively connected for the taxable year with the conduct of a trade or business in the United States by that individual.

Section 871(b) of the Code provides that a nonresident alien individual engaged in a trade or business within the United States during the taxable year is taxable as provided in sections 1 or 55 of the Code, on his taxable income that is effectively connected with the conduct of a trade or business within the United States.

Section 873(b)(3) of the Code allows a nonresident alien individual a deduction under section 151 of the Code for only one personal exemption, unless the individual is a resident of a contiguous country or a national of the United

States. The personal exemption amount under section 151 for tax year 2006 is \$3,300.

SECTION 3. DISCUSSION

Treasury and the Service will amend the regulations under §1.6012-1(b)(2) to eliminate the Form 1040NR filing requirement for a nonresident alien individual who earns less than the amount of one personal exemption as United States source wages that are effectively connected with a United States trade or business (effectively connected wages) and who is required to file a United States income tax return because of those wages. All nonresident alien individuals who earn effectively connected wages are entitled to at least one personal exemption under section 151. Therefore, by amending the regulations, the new exception would treat nonresident alien individuals who earn effectively connected wages in an amount that is less than the amount of one personal exemption more similarly to United States citizens and residents who earn wages of less than the exemption amount. The exception would apply even if the nonresident alien individual also has United States source fixed or determinable annual or periodical gains, profits, or income (FDAP), provided that his United States tax liability for such income is fully satisfied by the withholding of tax at source.

The amendment to the regulations, however, will not affect the filing requirements of a nonresident alien individual who seeks a refund of an overpayment of United States tax, has a United States income tax liability with respect to FDAP that is not fully satisfied by withholding at source, or who has

income exempt or partially exempt by reason of an income tax convention or any section of the Code.

SECTION 4. EFFECTIVE DATE

Regulations incorporating the guidance set forth in this notice will apply to tax years beginning on or after January 1, 2006. Until such regulations are issued, nonresident alien individuals may rely on this notice.

SECTION 5. DRAFTING INFORMATION

The principal author of this notice is Paul J. Carlino of the Office of Chief Counsel (International). For further information regarding this notice, contact Mr. Carlino at (202) 622-3840 (not a toll free call).